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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 52.

ARCH R. EVERSON, *Appellant*,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, IN THE COUNTY OF MERCER, ET AL., *Appellees*.

On Appeal from the Court of Errors and Appeals of the State of New Jersey.

BRIEF OF STATE COUNCIL OF THE JUNIOR ORDER OF UNITED AMERICAN MECHANICS OF THE STATE OF NEW JERSEY, AS AMICUS CURIAE.

MILTON T. LASHER,
Counsel.

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BRIEF OF STATE COUNCIL OF THE JUNIOR ORDER OF UNITED AMERICAN MECHANICS OF THE STATE OF NEW JERSEY, AS AMICUS CURIAE.

The "State Council of the Junior Order of United American Mechanics of the State of New Jersey" is a fraternal patriotic order. It was incorporated by an act of the Legislature of the State of New Jersey in the year 1875. It has approximately 20,000 members in its subordinate councils throughout the state. One of its objects, as stated in its State Council Constitution, is to foster the public school system. Throughout its long history it has taken a keen interest in all matters pertaining to the public schools and has actively supported legislation and various movements conducive to the improvement of the public schools. It is dedicated to the principle of separation of church and state.

THE IMPORTANCE OF THE ISSUE.

The case before the Court has a significance far outreaching the particular circumstances in its underlying facts. It is a case dealing with the transportation of children to sectarian schools. This in itself is an important issue, one which has come before a number of state courts in the last twenty-five years. It is a currently live issue. Great emphasis upon consolidation of rural schools in recent years has made necessary the transportation of pupils.

However, the instant case involves more than the transportation of pupils to a consolidated school. It is more than a question of the validity of a statute permitting sectarian school pupils to ride in public-owned school buses. The situation in New Jersey involved the payment of tax revenues to parents of children to reimburse them for the transportation expenses of their children attending sectarian schools. Therefore, the issue not only deals with transportation of sectarian school pupils in a general way, but it also deals specifically with the use of public moneys for sectarian purposes.

These facts bring into the case the whole panorama of state aid to sectarian schools and the separation of the church from the state. The desirability of keeping the church separated from the state was apparent to the framers of the Federal Constitution who had themselves witnessed, or were not many generations removed from, religious strife which had convinced them that complete religious freedom and separation of the church and the state should be one of the basic principles in the new Government. State constitutions are more specific in this regard than the Federal Constitution. Every state constitution guarantees religious liberty and in more or less detail defines the intention of the people to keep the church and state separated. One phase of the separation of church and state involves the compulsory support of sectarian institutions, through the use of revenues for aid to such schools.

In the early days of our Country, many schools were operated by churches and as the state gradually took over the function of public education, there was for a time a legal link between church-sponsored schools and the state. By the beginning of the nineteenth century the rudiments of state public-school systems had been established. Schools maintained by private trusts and religious groups were operated along side of the public schools which were state supported. Occasionally a grant of public funds was made to a privately operated school, since, until the Civil War, few states specifically prohibited the use of public funds for sectarian education. However, after the middle of the century, states began to amend their constitutions to prohibit the use of tax revenues for sectarian purposes. Today, all states except Maine and North Carolina so provide. The instant case therefore is of interest nationally.

TRANSPORTATION OF SECTARIAN SCHOOL PUPILS.

A number of states have legislation permitting the transportation of sectarian school pupils at public expense. California Statutes and Amendments to the Codes, 1943, Ch. 71, sec. 16257, p. 634; Illinois School Code, 1945, Art. 29, sec. 7; Maryland Acts of 1937, Ch. 185 (Baltimore County); Maryland Acts of 1939, Ch. 140 (St. Mary's County); Massachusetts Acts of 1936, Ch. 390; Michigan Statutes Annotated, Title 15, sec. 15.457, as amended in 1945; Revised Laws of New Hampshire, 1942, Ch. 135, sec. 9; New Jersey Statutes Annotated, 1940, Title 18, sec. 18, 14-8, as amended in 1941; New York Consolidated Laws, Ch. 16, sec. 206 (18); Oregon Compiled Laws Annotated, 1940, Title 111, sec. 111-874. Some of these laws give to private- and sectarian-school pupils the same transportation privileges enjoyed by pupils attending the public schools, provided no new routes are established and the children live on or near an established public-school bus route. Others are unqualified.

The New York law, *supra*, was enacted to implement a constitutional amendment adopted in 1938 and allowing

transportation of sectarian-school pupils as an exception to the otherwise general constitutional prohibition against the use of public funds for sectarian purposes. New York Constitution, Art. XI, sec. 4, as amended in 1938. The constitutional amendment had been adopted because the New York courts had declared a prior law permitting transportation of parochial school pupils unconstitutional under the Constitution as then written. *Judd* v. *Board of Education*, 278 N. Y. 200, 15 N. E. (2d) 576 (N. Y. 1938).

Kentucky also permits private-school pupils to be transported on public school buses, but only if the cost is paid out of county funds without the use of any educational funds, and where the roads are dangerous because of absence of any sidewalks. Kentucky Revised Statutes, 1944, sec. 158.115, as added in 1944. This law was enacted after the Kentucky courts declared unconstitutional a previous statute permitting sectarian-school pupils to be transported in public-school buses if they lived a distance from the school they attended. *Sherrard* v. *Jefferson County Board of Education*, 294 Ky. 469, 171 S. W. (2d) 963 (Ky. 1942).

In addition to the states where there is explicit permissive legislation, several other state pupil-transportation laws are written in language so general as to be applicable to both public- and private-school pupils. 1935 Colorado Statutes Annotated, Ch. 146, sec. 114, 115; Louisiana General Statutes (Dart), 1939, Title 18; sec. 2248; Throckmorton's Ohio Code, 1040, Title V, sec. 7731. However, the Ohio Attorney General has ruled that the Ohio statute refers only to public-school pupils. 1927 O. A. G. No. 1094. In the other two states, Colorado and Louisiana, sectarian-school pupils are transported under the general transportation law.

None of these current laws, *supra*, has been passed upon by the respective state courts except the Maryland, Kentucky, and New Jersey laws. *Board of Education of Baltimore County* v. *Wheat*, 174 Md. 314, 199 Atl. 628 (Md. 1938); *Everson* v. *Board of Education of Ewing Township*, 133

N. J. L. 350, 44 A (2d) 333 (N. J. 1945). However, other statutes permitting the transportation of sectarian-school pupils have been declared unconstitutional in Delaware, Oklahoma, and Washington. *State ex rel. Traub* v. *Brown*, 6 Harr. 181, 172 Atl. 835 (Del. 1934); *Gurney* v. *Ferguson*, 190 Okla. 254, 122 P. (2d) 1002 (Okla. 1941), *cert. den.* 317 U. S. 588 (1942); *Mitchell* v. *Consolidated School District*, 17 Wash. (2d) 61, 135 P. (2d) 79 (Wash. 1943).

Two states in which there has been no permissive legislation have met the problem under general transportation laws. The first case came up in Wisconsin when two out of about thirty transported pupils attended a public school, while the other twenty-eight attended sectarian schools. The Wisconsin court declared the transportation contract void. There was no specific legislation authorizing the transportation of sectarian-school pupils, and the transportation contract had been consumated under the power of the school district to close its school and transport pupils to an adjoining district. The court held that this power enabled the school district to contract for transportation of pupils to public school only. *State ex rel. Van Straten* v. *Milquet*, 180 Wis. 109, 192 N. W. 392 (Wis. 1923).

Approximately ten years later, in South Dakota, a different question arose when a school was consolidated. As with most such statutes, the permissive legislation allowed the district to transport the pupils to an adjoining district, or to pay for their lodging and board in the adjoining district. One parent sent his children to a parochial boarding school and attempted to collect from the school district the cost of their tuition, board and lodging. The court held that the responsibility of making provision for the schooling of pupils is not discharged by paying a sum of money to the parents, permitting them to send their children wherever they wish; nor could the district pay the sectarian school since it is not a part of the public-school system of the state. *Hlebanja* v. *Brewe*, 58 S. D. 351, 236 N. W. 296 (S. D. 1931).

In only two states have the courts unqualifiedly approved the transportation of sectarian-school pupils at public expense—Maryland, and New Jersey in the instant case below. *Board of Education of Baltimore County* v. *Wheat, Everson* v. *Board of Education*, both *supra*.* The theory propounded in these two cases was different. The Maryland court upheld transporting sectarian-school pupils under the police power of the state. The majority of the New Jersey court held that the constitutional restriction upon the use of school-funds for public-school purposes was limited only to the perpetual fund of the state. With regard to the Maryland theory, it might be refuted by the general principle that the police power does not contravene the constitutional provisions except in very unusual circumstances, not applicable in pupil-transportation cases. The New Jersey theory will be discussed in a later section of this brief.

In the meantime, Maryland extended the scope of its approval of transportation of sectarian-school pupils in a 1942 decision which upheld the payment of public funds to sectarian schools for the transportation of their pupils in buses owned by the sectarian schools. *Adams* v. *County Commissioners of St. Mary's County*, 180 Md. 550; 26 A. (2d) 377 (Md. 1942). This decision supports the contention of the dissenting judges in New Jersey in the instant case, below, when they disapproved the "child benefit" theory in these words:

> We quickly perceive that it applies not merely to transportation costs but to the potential costs of the many and varied items entering into modern education. There is no logical stopping point. Related items, already in the public school system, in addition to the vast field having to do with the actual imparting of

* The later Kentucky case (*Nichols* v. *Henry*, 191 S. W. 2d 930) was based on the qualified and restricted statute before it and expressly reaffirmed the earlier case denying the validity of the earlier statute which was in general terms and not qualified.

knowledge, are the installation and maintenance of cafeterias, the preservation and promotion of the health of pupils, the employment of medical inspectors and nurses, the keeping of records of development and growth, and the supervision of athletic activities and bodily exercise. I am unable to distinguish between the logic of using public funds for one as against another of the several parts of the system pursued by the public schools..... Every step in the educational process is, presumably, for the benefit of the child.... Consequently, if the argument is sound, it is within the discretion of the legislature, free of constitutional restraint, to provide for practically the entire cost of education in private and parochial as well as in public schools. 44 A (2d) 333, 339.

Amicus Curiae recognizes that these statutes and court decisions from other jurisdictions are not controlling in the instant case. The review has been submitted to acquaint the Court with the scope of the transportation issue and the prevailing view of the state courts as to the legality of transporting sectarian-school pupils at public expense. As we view the matter, the transportation of sectarian-school pupils has been held invalid in Delaware, Oklahoma, South Dakota, Washington, Wisconsin, while it has been unqualifiedly approved judicially in Maryland only outside of the instant case and by constitutional amendment in New York.

USE OF TAX REVENUES FOR SECTARIAN PURPOSES.

The facts of the *New Jersey* case differ from the facts in most of the other pupil-transportation cases. New Jersey amended its transportation law in 1941 to permit transportation to any school except one operated for profit, provided new routes were not established for the purpose. New Jersey Statutes Annotated, 1940, *supra*. Appellees passed a resolution appropriating money to pay parents the transportation costs they had expended in sending their children to school by common carrier. The appropriation was a total

amount computed on the basis of the number of school days attended. No distinction was made between public and private-school attendance. In so doing Appellees caused public moneys to be passed from the public treasury to the hands of some of its residents, for a sectarian purpose. These funds had been collected by taxes imposed upon the citizens of the state. The New Jersey Constitution prohibits the use of tax revenues for sectarian purposes.

> . . . nor shall any person be obliged to pay tithes, taxes or other rates for building or repairing any church or churches, places of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right, or has deliberately and voluntarily engaged to perform. New Jersey Constitution, Art. 1, sec. 3.

Thus, Appellees violated this section of the State Constitution in addition to Art. 4, sec. 7, par. 6 which provides that the state school fund shall be used only for public-school purposes. Ignoring Art. 1, sec. 3, the majority of the New Jersey Court reasoned that there was no restriction in Art. 4, sec. 7, par. 6 on any school money except the perpetual fund, and that other state school money or local funds could be used without constitutional restrictions. Examination of the constitutional history of Art. 4, sec. 7, par. 6 will throw light on this reasoning.

The first Constitution of New Jersey was adopted in 1776. The Constitution of 1776 remained in force until superseded by the Constitution of 1844. In the Constitution of 1844 the public-school system of the State of New Jersey was created. Considerable discussion among the delegates turned upon whether education should be established by constitutional provision or be omitted from the constitution and left to the discretion of legislators. Some support for education had been given previously by legislative enactment, but in general a state system of public schools was a novel idea which some of the convention delegates believed was experimental. Some delegates were of

the opinion that, should support for the state public school system be written into the constitution, the school funds should be restricted to the support of public schools in order to prevent conflict among religious sects who might vie with each other to obtain a part of the school fund for the support of their sectarian schools. A committee of five was appointed on the subject of education, and this committee reported the section on education as follows:

> The fund for the support of free schools, and all money, stock, and other property which may hereafter be appropriated for that purpose, shall be securely invested, and remain a perpetual fund; and the income thereof, except so much as it may be judged expedient to apply to an increase of the capital, shall be annually appropriated to the support of *public schools*, for the benefit of all people throughout the state; and it shall not be competent for the legislature to borrow, appropriate, or use the same, or any part thereof, for any other purpose, under any pretence whatever. Proceedings, New Jersey Constitutional Convention, 1844, pp. 400, 550 [Italics added].

Mr. Edsall moved further to amend the same by inserting before the word "benefit" the word "equal", stating that this was for the purpose of preventing all sectarian combinations from interfering to divert the true intention of the fund. (Proceedings p. 567.) This amendment was agreed to, and the section was adopted in the Constitution of 1844, and remained in force without amendment until 1875, when it was amended as follows:

> Insert the word "free" between the word "public" and the word "schools," and add to the paragraph the following:
>
> > The legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in this state between the ages of five and eighteen years. Laws 1875, p. 72; Laws 1876, p. 433.

It is contended by *Amicus Curiae* that the delegates to the Constitutional Convention of 1844 and the legislators in 1875 intended the school fund to be a perpetual fund the income of which should be used only for the support of public schools.

Furthermore, during this era there was widespread acceptance of the principle that public-school moneys should not be used for aid to sectarian schools. In 1875, the New Jersey legislators could not have been unaware and unaffected by the fact that other states were also in constitutional conventions at about the same time. Prohibitions regarding the use of public funds for sectarian institutions were adopted by Pennsylvania in its Constitution of 1873 (Art. III, sec. 17; Art. X, sec. 2); in the Arkansas Constitution of 1874 (Art. XIV, sec. 2); in the Nebraska Constitution of 1875 (Art. VII, sec. 11); by Colorado in the Constitution of 1876 (Art. V, sec. 34), and by Texas in its Constitution of 1876 (Art. I, sec. 7; Art. VII, sec. 5). Some states had previously incorporated a similar provision. Others did later. Today all states so provide except Maine and North Carolina. The principle is well established and rarely is attempt made to secure a direct appropriation for a sectarian institution. Transportation aid is one of the indirect methods.

NO ANALOGY BETWEEN INSTANT CASE AND PRECEDENT IN TEXTBOOK CASE.

In 1930 this Court approved a decision in the Louisiana court upholding the distribution of free textbooks to sectarian-school pupils. *Cochran* v. *Louisiana State Board of Education*, 168 La. 973, 123 So. 664 (La. 1929); *affirmed* 281 U. S. 370 (1930). The Louisiana court in this and a companion case devised what has become known as the "child benefit" theory. *Bordon* v. *Louisiana State Board of Education*, 168 La. 1005, 123 So. 655 (La. 1929). The Louisiana decision appears to have been based on several factors, each of which may be differentiated from the instant case. The Louisiana law provided for free textbooks for the school

children of the state. The law did not provide for the purchase of books for sectarian schools as such. The New Jersey transportation law does provide explicitly for transportation of pupils to sectarian schools. The Louisiana law was said to be enacted for the benefit of the children of the state and the "resulting benefits to the state"; the children of the state, not the schools, were said to be the beneficiaries of the statute. The New Jersey law benefits the children of that state also, but as was pointed out by the dissenting judges in the instant case below, all educational opportunity benefits the children exposed to it and results in benefits to the state. However, transporting children to a sectarian school benefits the school more directly than the distribution of free textbooks to sectarian-school pupils, since the school can obtain textbooks with its own funds, once the children are enrolled in the sectarian school; whereas, if the children were not publicly transported to sectarian schools, parents would be obliged to bear the cost of taking their children if they wished them to attend such a school. Therefore transportation of children to sectarian schools at public expense augments the enrollment and attendance at such schools and constitutes an indirect aid to the sectarian schools since it puts the children in the schools to be exposed to sectarian education.

EFFECT OF THE COURT'S DECISION.

If the Court should express the opinion that the transportation of sectarian-school pupils at public expense is an invalid use of public funds since it is an aid to sectarian schools and thus violates the basic American principle of the separation of the church and state, the decision would deter the enactment of similar legislation in other states.

At the same time, it may be pointed out that a decision against Appellees in the instant case, regardless of the scope of the Court's opinion, would not interfere with other relations between sectarian schools and the state; e.g., their exemption from taxation. Most state constitutions specific-

ally exempt from taxation all educational property, or empower the legislature to make such exemption. The policy has been upheld as an encouragement "necessary to the advancement of civilization, and the promotion of the welfare of society." *People* v. *Barber and Miller*, 42 Hun. 27 (N. Y. 1886).

Nor would a decision against Appellees interfere with whatever incidental aid sectarian schools may receive by the incorporation laws of the several states, since merely incorporating a denominational group is not considered state aid of such a tangible nature as to constitute violation of constitutional provisions regarding the separation of church and state. *Terrett* v. *Taylor*, 13 U. S. (9 Cranch) 42 (U. S. 1815); *Bradfield* v. *Roberts*, 175 U. S. 291 (1899).

On the other hand, a decision in favor of Appellees would have far-reaching effects. States now permitting transportation of sectarian-school pupils at public expense would be encouraged to provide other services to children attending sectarian schools. States which do not now furnish transportation of sectarian-school pupils would see the way to justify a move in that direction. Eventually, the country would develop two school systems, one so-called public, the other sectarian, but publicly supported. That result could not fail to weaken our public school system, and the weakening of our public school system would unquestionably curtail the vast flow of strength which it has brought to our nation's progress.

It is with this thought in mind that *Amicus Curiae* asks the Court to weigh carefully all the ramifications of the instant case and decide the issue, not for today only, but with a long range view of the possible effects of its decision in years to come.

Respectfully submitted,

STATE COUNCIL OF THE JUNIOR ORDER OF UNITED AMERICAN MECHANICS OF THE STATE OF NEW JERSEY,

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